APPENDIX A

A CONDITION-BY-CONDITION ANALYSIS OF THE PROPOSED CONDITIONS

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Federal Performance Parity Plan (Condition I)

Proposed Condition I (and Attachments A through A-6) outline a "Federal Performance Parity Plan." The proposed plan consists of 20 performance measurements, to be reported in 13 states, and it provides for limited, liquidated damages and penalty payments over a 3-year period, applying certain statistical tests to parity or benchmark standards. Applicants tout the following claimed benefits of Condition I:

- "as an additional incentive for residential" local telephone exchange service competition, Applicants will be required "to pay substantial penalties to CLECs if SBC/Ameritech do not provide them with nondiscriminatory service";

- Applicants "will be required to make payments (which could total as much as $1 billion over three years) to CLECs if [they do] not provide parity service or meet certain specified benchmarks";

- "The 20 performance measurements are designed to demonstrate whether SBC/Ameritech is providing parity or benchmark performance to each CLEC."[1]

All of these claims are untrue or highly misleading. Condition I will *not* benefit consumers and competition, nor contribute to the public interest, because it offers *less* in the way of performance measurement and self-enforcement than SBC and Ameritech are already obligated to provide. On balance, Condition I represents a substantial retreat from the performance measurement and enforcement plan that SBC has offered in Texas (a plan that itself has serious flaws). Moreover, Applicants already had offered to develop terms similar to the Texas plan in Illinois. Substantially more rigorous measurement requirements have also been

[1] July 1, 1999 Letter, pp. 3-5; Proposed Conditions, Attachment A, ¶ 5.

ordered in Michigan. Indeed, because a merged SBC-Ameritech would have an incentive to establish a uniform system of measurements across all of the states it serves, there is reason to believe that Applicants would provide the terms of the more rigorous Texas plan in all states *without* Condition I. In these circumstances, the public would be better off without Condition I than with it.

Against this background, approval of the proposed Federal Performance Parity Plan would send the wrong message to SBC and Ameritech, to the states, and to incumbent LECs generally regarding the performance measurement and self-enforcement requirements of Sections 251 and 271 of the Act. Although Condition I is not on its face an exclusive set of performance terms, there will be great pressure upon others to use Condition I as the standard around which state enforcement plans and interconnection agreement terms will be negotiated and set in the future. Indeed, Applicants already have begun to apply that pressure. Ameritech Michigan has asked the Michigan Public Service Commission ("MPSC") to reconsider its order requiring performance measurements and to defer application of any requirements that "conflict with the performance measurements adopted, or to be adopted," in this proceeding based on its representation that "in the near future, the FCC is likely to adopt a set of performance measurements that may be part of the approval process involving the proposed SBC/Ameritech merger."[2] Ameritech Michigan has told the MPSC that reliance on the MPSC's measures would require Ameritech "to devote significant resources to implementing processes that would not

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[2] Ameritech Michigan's Petition for Rehearing or Clarification, *Ameritech Michigan's submission on performance measurements, benchmarks, and reporting in compliance with the October 2, 1998 Order in MPSC Case No. U-11654*, Case No. U-11830, at 5-6 (Mich. PSC June 28, 1999).

applications on that basis. Alternatively, if it believes that the possibility remains that different conditions could be crafted that would eliminate or compensate for those adverse consequences, the Commission should scrap the document SBC and Ameritech have drafted and attempt to develop more serious requirements – this time through an open process in which other affected parties could participate meaningfully. But the worst outcome of all, from the standpoint of competition and consumers, would be to approve the merger with the Proposed Conditions (or some variant thereof). Indeed, if the Commission is determined to approve the merger, it would be far better to do so with no conditions at all than with the regressive and anticompetitive conditions that have been published for comment.

AT&T's Comments are divided into two principal parts. The body of the Comments addresses generally the fundamental problems with the Proposed Conditions as a whole, and explains why Applicants' proposal does not mitigate the anticompetitive consequences of the merger or present an improvement over the *status quo*, but rather will, if adopted, exacerbate the anticompetitive consequences of any Commission approval of this transaction. Appendix A then addresses, on a Condition-by-Condition basis, the specific flaws in, and adverse consequences of, each of the principal Proposed Conditions relating to local competition. The Comments also include in Confidential Appendix B a discussion of relevant confidential information submitted by Applicants.

ARGUMENT

The merger of SBC and Ameritech would enable a single firm to control a third of the nation's monopoly local telephone access lines – from Michigan to Texas, and including California and Connecticut – covering 40 percent of the total population of the United States.

go undetected. And Condition I relies on arbitrary benchmarks in circumstances where parity comparisons should be used.

Third, Condition I is incomplete in many key respects. Several of the key definitions are inadequate. Condition I includes no provision for independent validation of the documentation, systems and practices that Applicants will employ to collect, analyze, and report the performance data called for under Condition I. And with only a 45 month life, the limited benefits that are offered by Condition I bear no relation to the life of the proposed merger whose anticompetitive effects Condition I is supposed to (but does not) mitigate.

For these reasons, detailed below, approval of Condition I would "lower the bar" substantially in defining the contents of an acceptable performance measurement and self-enforcement plan. Accordingly, that Plan should be firmly rejected.

A. Condition I Is Too Narrow And Weak To Protect Against Backsliding

One purpose that ideally might be served by a performance measurement plan would be to provide "private and self-executing enforcement mechanisms that are automatically triggered by noncompliance with the applicable performance standard without resort to lengthy regulatory or judicial intervention." Memorandum Op. and Order, *Application of Bell South Corp., et al. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd. 20599, ¶ 364 (1998) ("*Second BellSouth Louisiana Order*"). As this Commission has said, "the absence of such enforcement mechanisms could significantly delay the development of local exchange competition by forcing new entrants to engage in protracted and contentious legal proceedings to enforce their contractual and statutory rights to obtain necessary inputs from the incumbent." *Id.* If Condition I offered an adequate self-enforcement mechanism to deter backsliding and

compensate competitive LECs for the harm caused by discriminatory or deficient wholesale support, Condition I could represent a contribution to the public interest. Unfortunately, Condition I falls well short of that mark.

1. Condition I Offers Less than SBC Already Offers at the State Level

The proposed Federal Performance Parity Plan is based on the "Performance Remedy Plan" that the Texas Commission has approved in outline form for SBC's affiliate, Southwestern Bell Telephone ("SWBT"), in the Section 271 proceedings held in that state.[5] Many features of the two plans are the same, and others are similar. The Texas plan has a number of flaws, such as the extensive reliance on benchmarks and the use of inappropriate statistical tests with benchmark measures, which are carried over to the Condition I or even made worse. Moreover, Condition I drastically limits Applicants' exposure to monetary sanctions.

The reduced deterrent and compensatory value offered by Condition I is evident just by looking at the gross cap on individual state damages. Under the Texas plan, SWBT's annual

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[5] The Performance Remedy Plan is described in a Memorandum of Understanding ("MOU") between SWBT and the Texas Public Utilities Commission, which that Commission approved in Project No. 16251 on April 29, 1999. The MOU reflects compromises arrived at by SWBT, Texas Commission Staff, and Chairman Wood in negotiations from which competitive LECs were excluded. The Texas Commission approved the MOU three days after its April 26, 1999 filing, having allowed not quite two full days for review and comment by competitive LECs. The Texas Commission has directed SWBT to incorporate that Plan and other aspects of the MOU into a Proposed Interconnection Agreement ("PIA"), which would be made available to Texas competitive LECs (at least so long as the Commission approves SWBT's Section 271 application by SWBT's unilateral January 1, 2000 deadline). AT&T has raised serious, extensive objections to the substance of the Texas Performance Remedy Plan, as well as the rest of the MOU and the PIA, and to the extraordinary procedure that has produced them. *See* Comments of AT&T of the Southwest, Inc. on SWBT's Proposed "Memorandum of Understanding," PUCT Project No. 16251 (Texas PUC April 28, 1999); Post-Workshop Comments of AT&T of the Southwest, Inc. on SWBT's Proposed Interconnection Agreement and Collocation Tariffs (Texas June 24, 1999) (including separate matrix of comments on performance measure and performance remedy plan issues).

Texas liability is capped at $120 million per year, combining both Tier 1 liquidated damages and Tier 2 regulatory assessments.[6] By contrast, Condition I limits annual Texas liability – Tier 1, 2, and 3 – to a range of $32.79 million (first year) to $81.93 million (third year).[7] Moreover, one-third of Condition I "exposure" is in Tier 3, where liability can be incurred only if Applicants are so incompetent or malicious as to discriminate across the competitive LEC industry in all 13 states simultaneously and for a sustained period. Once this unrealistic exposure is removed from consideration, Condition I limits SBC's Texas exposure to Tier 1 and Tier 2 liability to $21.86 million (first year) to $54.62 million, a range about one-fifth to less than one-half of the exposure that SWBT already has agreed to under the Texas plan.

There is no reason to expect that other state commissions will allow SBC to offer less protection to their citizens than SWBT has been required to offer in Texas, absent a signal from this Commission that less will do. Indeed, even in Ameritech territory, SBC has indicated that it is willing to develop performance measurement and enforcement terms that are based on the Texas plan.[8] Tellingly, however, SBC also has offered any performance measurement terms that

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[6] Proposed Interconnection Agreement, Attachment 17, section 7.3. Tier 1 liquidated damages and Tier 2 assessments are defined much the same in the Texas plan and the Federal Plan, although Condition I substitutes the even more euphemistic "voluntary payments" for the Texas term "assessments," both of which are used to refer to penalties for sustained discrimination against competitive LECs in the aggregate. The most obvious reason for this sophistry is so that Applicants can build a case that these "voluntary payments" are tax deductible as "penalties" are not.

[7] Proposed Conditions, Attachment A-6.

[8] *See* Direct Testimony on Re-Opening of William R. Dysart, ICC Docket No. 98-0555, SBC-Ameritech Exhibit 10.0, pp. 3, 10 (numbered paragraphs 2, 8).

might emerge from the Commission's merger review and bluntly told the Illinois Commerce Commission that it cannot have both.[9]

Caps should be rejected altogether, as shown below. The $120 million annual cap in Texas is itself inadequate, because it pales in comparison to the Texas local revenues that SWBT has monopolized in the past and has obvious incentives to protect in the future.[10] At a minimum, to advance the public interest, Condition I should increase Applicants' exposure in Texas to a level that has the potential to be an effective deterrent and provide adequate compensation.[11] Instead, Applicants' proposal sharply reduces that exposure and sets a weak standard for other states to follow.

2. Other Factors Reduce Applicants' Exposure Even Further

Although Condition I's caps on liability are low relative to the Texas plan, Applicants are highly unlikely ever to make payments that approach those caps, even with sustained, seriously discriminatory performance. At least two factors further reduce Applicants' realistic exposure under the proposed Federal Performance Parity Plan.

First, Condition I includes a set of caps within caps. To begin with, any substantive cap on liability represents an artificial limitation and should be rejected by the Commission in any

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[9] *Id.* at 2-3 (emphasis added).

[10] In Texas alone, SWBT's local market revenue (local telephone service, intraLATA toll, intra- and interstate access, and all other local exchange service) exceeded $5 billion in 1997. *See* PUCT Project No. 16251, Responses to General Counsel First Request No. 7-LLc (Supplement Prior Answer with 1997 Data).

[11] As performance is aggregated across more competitive LECs and more territory, variance increases and discrimination becomes harder to detect. Any cap that might be considered for the 13-state penalties (Tier 3) accordingly should be set at least in high multiples of the sum of individual state caps set at levels that are designed to be adequate for deterrent and compensatory purposes within the state, *i.e.*, higher than the current Texas cap.

self-enforcement or anti-backsliding plan. If there is concern that application of "automatic" liquidated damages and penalty terms might result in sanctions that seem unjust in certain circumstances or may fail to account for compelling mitigating circumstances, less restrictive measures will address that concern. For example, Condition I itself provides Applicants with a generous 9-month "break-in" period, during which damages and penalties do not apply to the measurements.

Moreover, AT&T has not opposed the concept of "procedural caps" in negotiations of enforcement terms in Texas and California. Under this concept, a regulatory commission or other arbitrator is granted discretion to adjust the amount of damages once they exceed a certain threshold, upon a sufficiently compelling showing by SBC. For example, the Texas plan provides that, when liquidated damages (Tier 1) payments to an individual competitive LEC exceed $3 million in one month (or $10 million to competitive LECs collectively), SWBT may pay the balance into escrow and bring a show cause proceeding in which it has the burden to demonstrate why, under the circumstances, "it would be unjust to require it to pay liquidated damages in excess of the applicable threshold amount."[12]

With a procedural cap operating as a safety valve, there is no justification for placing a substantive cap on damages or penalties. For example, if the procedural cap were $3 million per month and Applicants' reported performance for a competitive LEC was so poor that it incurred a $5 million liability to a competitive LEC one month, and Applicants were unable to prove to a

[12] Proposed Interconnection Agreement, Attachment 17, section 7.3. This procedural cap was developed in negotiations between SWBT, Commission Staff, Chairman Wood, and interested competitive LECs, including AT&T. The substantive cap ($120 million per year) was added to the Texas plan in final negotiations, from which competitive LECs were excluded. AT&T and other competitive LECs have objected to the substantive cap in Texas.

have previously committed to do. For example, the provision on performance measures (Condition I) offers considerably less than what SBC had already agreed to provide in Texas, and what it appeared (prior to release of these Conditions) to be willing to offer in its (and Ameritech's) other States. Condition I provides for only a small subset of the measures that are necessary to determine whether SBC and Ameritech are meeting their statutory obligations across the range of wholesale support activities that are critical to local competition, and only a small subset of the 121 performance measures agreed to in Texas. And it substantially limits damages liability *below* what SBC agreed to in Texas – such that if these Conditions were in operation in Texas today, SBC's liquidated damages payments to AT&T to date would have been reduced by 40 percent.

Third, in those few instances in which the Proposed Conditions offer something that for now is not otherwise required to be made available, the Conditions are written so as to assure that the offering will have absolutely no competitive benefit. The so-called "Carrier-to-Carrier Promotions" (Condition XI) provide a particularly vivid illustration. Even ignoring the facially discriminatory, unlawful, and anticompetitive nature of the provisions in that Condition (*see infra* at 15-17), they have been carefully crafted by Applicants to ensure that they present no threat to the Applicants' monopolies. To begin with, the caps have been set at extraordinarily low levels. AT&T estimates that the loop discount will apply to no more than 2.8 percent of the Applicant's total switched lines, and that the resale and platform offerings (taken together) will

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regulatory commissions that the Commission's approval of the Proposed Conditions here establishes a bar above which they cannot or should not be required to exceed under the Act.

limit on damages at a lower level as well. For example, Condition I limits any individual competitive LEC to 10 percent of the monthly cap on liquidated damages in a state.[13] In Texas, which is second only to California in its allotment of damages under Condition I, this limitation will mean that a competitive LEC may receive only a maximum of $91,000 in liquidated damages in a single month in Year 1, no matter how discriminatory SBC's performance is and no matter how much harm the competitive LEC suffered. If Condition I were in operation in Texas today, for example, it would have reduced Southwestern Bell's only liquidated damages payment to AT&T to date by 40 percent.[14] This "micro-capping" artificially reduces competitive LECs' compensation and Applicants' exposure to trivial levels.

The proposed Federal Performance Parity Plan also reduces Applicants' exposure, relative to the Texas plan from which it is drawn, in another way. Condition I takes the damages and penalty quantities (per occurrence, per measure) from the Texas plan. Those quantities were developed, and tested for adequacy and fairness, largely by modeling the results that would be obtained if they were applied across the *full* range of 80 measures that are subject to Tier 1 liquidated damages and 50 measures contributing to Tier 2 assessments under the Texas plan. Condition I takes the Texas damages and penalty quantities, but applies them, for Tier 1 and Tier

[13] Proposed Conditions, Attachment A, ¶ 8. Condition I contains a vague requirement here that payments to a competitive LEC will be subject to a monthly "true-up." The meaning of this requirement is unclear, part of the unfinished business of Condition I, unless it has the troublesome meaning that Applicants plan to be able to demand refunds from competitive LECs for "excess" liquidated damages payments.

[14] Based on maintenance performance data reported to AT&T in Texas for the month of March 1999, SWBT has paid AT&T $150,000 in liquidated damages. Had Condition I been in place, SWBT's liability would have been capped at $91,000, even if SWBT paid no damages to any other competitive LEC in Texas that month against a total Texas monthly cap of $910,000.

2, only to 36 of the measures that they were calculated to support under the Texas plan.[15] To transfer damages quantities defined under one plan to a plan that contains many fewer measures simply reduces the incumbent's exposure – and the deterrent and compensatory value of the plan – without justification.

Condition I also includes built-in statistical protections for Applicants. Under any statistical measurement system employed to compare two sets of results, there is some risk that the incumbent will be found in violation of the parity standard[16] as a result of random variation in the data (so-called "Type 1" error, or "false positives"). Under Condition I, Type 1 error is kept to a minimum in at least three ways. The "critical z-value" used as the pass-fail criterion for performance on a single measure is set so as to reduce Type 1 error to 5 percent. Under Tier 1, Applicants are permitted to violate up to "K" measures a month without paying damages, and this "K value" is set at a level that reduces overall Type 1 error to 5 percent. Under Tiers 2 and 3, the requirement of 3 consecutive months of violation reduces the risk of Type 1 error to a fraction of 1 percent.

There is a price paid for limiting Applicants' exposure in this way, and as usual competitive LECs are asked to pay that price. By setting the Type 1 error risk this low, Condition I creates a *higher* risk that Applicants could engage in discriminatory conduct that will

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[15] The 20 measures listed in Attachment A-1 and further defined in Attachment A-2 in Condition I equate to 36 measures under the Texas plan. The Texas plan counts as separate measures each of the items that are defined separately in Attachment A-2 of Condition I. Thus, Measure No. 2 under Condition I, SBC Caused Missed Due Dates, which appears in Attachment A-2 as Measures 2a through 2d, is treated as four measures under the Texas plan.

[16] These statistical tests should not be applied to benchmark measures at all. With a benchmark, the standard either is met or it is not. AT&T describes the error in Condition I's use of the z-test for benchmark measures in section C below.

not be detected by the statistical enforcement plan (this type of detection failure, which also results from random variation in the data, is known as "Type 2" error, or "false negatives"). The point here is that Condition I is heavily weighted to protect Applicants from paying any monetary sanctions.

For the above reasons, Condition I as presented is not even an effective self-enforcing measure to protect competitive LECs and the public against backsliding, and it should be squarely rejected.

B. Condition I Provides Absolutely No Basis For Determining Compliance With The Act

The other purpose to be served by a performance measurement plan is to assist the Commission in evaluating the applicants' compliance with the market-opening provisions of the Act. The Commission has said that "[c]lear and precise performance measurements are critical to ensuring that competing carriers are receiving the quality of access to which they are entitled." Memorandum Op. and Order, *Application of Ameritech Michigan to Provide in-Region, InterLATA Services in Michigan*, 12 FCC Rcd. 20543, ¶ 209 (1997) ("*Ameritech Michigan Order*"). The Commission should send an unmistakable message to the RBOCs and to the States that the proposed Federal Performance Parity Plan will not provide the basis for a demonstration of checklist compliance.

1. Condition I Applies to Too Few Measures

To begin with, Condition I encompasses only a small subset of measures that are necessary to determine whether the incumbent is meeting its statutory obligations across the range of wholesale support activities that are essential to local competition. For example, the Texas plan, on which Condition I is supposedly based, contains 121 performance measures – the

80 for which that plan provides liquidated damages, plus 41 others that the Texas Commission has agreed will provide relevant performance data for informational purposes, particularly in the early stages of assessing how well the local marketplace is working for competitors.[17] SBC has offered those same measures in Section 271 proceedings this year in Missouri, and it can be expected to offer them in all of its states. Indeed, SBC's performance measurements director is on record as favoring a uniform system of performance measures across SBC's territory for ease of administration and consistency in reporting.[18] Applicants have also offered the 121 Texas measures as a *starting* point for a 150-day collaborative process to develop a plan in Illinois.[19]

Condition I proposed here omits many of these critical performance measurements. For example, such key areas as unbundled loop "hot cuts" (coordinated conversions) and local number portability are barely addressed. Each of these is the subject of only a single measure, premature disconnects. Proposed Conditions, Attachment A-1, No. 13. While premature

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[17] In Texas, SWBT negotiated a controversial term of the MOU with the Texas Commission, which states as a goal reducing the number of measures subject to damages and assessments by half over a two-year period. MOU, Attachment B, section VII.E. When competitive LECs objected to the one-sided nature of this objective, the Commission emphasized that this term is aspirational in nature, and that measures will only be eliminated if experience proves them to be duplicative or unnecessary. Yet Condition I offered here would begin by offering fewer than half of the 80 measures subject to liquidated damages under the Texas plan. No analysis has been put forward to justify the elimination of more than two-thirds of SWBT's performance measures from Condition I, and AT&T does not believe that any analysis could support such a result, particularly at this early stage of performance measurement implementation and reporting by SWBT.

[18] Missouri 271 Proceedings, Ex. 16 at 4-5 (Dysart direct) ("Most parties would agree that one set of performance measurements for all SWBT states is in the interest of both SWBT and the competitive LECs. One common set of performance measurements will provide consistency in reporting and analysis from state to state. This will be more efficient for both SWBT and the CLECs.")

[19] Direct Testimony on Re-Opening of William R. Dysart, ICC Docket No. 98-0555, SBC-Ameritech Exhibit 10.0, pp. 2-3.

disconnects are serious failures, they are by no means the only concern surrounding hot cuts and local number portability. Condition I inexplicably drops a Texas measure related to late provisioning on coordinated conversions and several Texas measures related to local number portability.[20] Moreover, neither Condition I nor the Texas plan addresses "breakage on impact," the type of service disconnection to the end user that results, for example, when the loop has been reconnected by the incumbent LEC and reported as complete, but was in fact placed on the wrong termination – a type of problem that is occurring with increasing frequency during UNE loop testing with SWBT and other RBOCs.

To take another example, this Commission has stated that "[t]imely delivery of order rejection notices directly affects a competing carrier's ability to serve its customers, because such carriers are unable to correct errors and resubmit orders until they are notified of their rejection by" the incumbent. *Second BellSouth Louisiana Order* ¶ 118. Yet this Plan omits rejection notice measures altogether. By contrast, the Texas plan includes three rejection-related performance measures, recognizing that all are important for diagnostic or informational purposes, and provides for liquidated damages on one of those measures.[21] SBC routinely offers these measures across its traditional service territory, yet they are omitted here.

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[20] The most recent statement of the Texas performance measure business rules accompanied a Memorandum to Hon. Patrick Wood, et al., from Katherine D. Farroba, Administrative Law Judge, *et al.*, PUCT Project No. 16251 (June 2, 1999) (hereafter "Texas June 2, 1999 Business Rules"). That document contains Staff recommendations on some matters of controversy, not relevant to the point here, that remain unresolved. In that document Performance Measurement Nos. 91-101 relate to LNP; Performance Measurement No. 115 addresses delayed coordinated conversions.

[21] Texas June 2, 1999 Business Rules, Performance Measurement Nos. 9-11.

Approval of Condition I as proposed would send the message that this minimal set of 20 performance measurements[22] is sufficiently complete to assess whether an RBOC is providing the nondiscriminatory support required under the Act. That simply is not so.

2. The Statistical Tests Are Too Skewed in Favor of Applicants

As described above, the critical z-value, the Tier 1 K value, and the repeated failure requirements under Tiers 2 and 3 all are designed to minimize the risk that Applicants will have to pay monetary consequences on the basis of a reported violation that actually results from random variation in the data. Whatever its merit as part of a self-enforcement scheme, that approach has no legitimate place in assessing compliance with the market-opening provisions of the Act. That is so because, as the risk of a "false positive" is reduced, the risk of a "false negative" is increased. That is, these statistical techniques that limit Applicants' exposure to paying damages when they "shouldn't" all have the effect of *increasing* the risk that Applicants will appear statistically to be in compliance with its nondiscrimination obligations when they really are not.[23]

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[22] Again, the 20 measures in Condition I equate to 36 measures as counted in Texas, which has a well-earned reputation for describing everything about itself as bigger.

[23] The statistical methods used in Condition I incorporate another deficiency of the Texas plan. Condition I labels the test that it uses for assessing Applicants' performance on a single measure as the "modified z-test." Proposed Conditions, Attachment A-3, p. 1. However, Condition I actually uses the modified z-test only for comparing performance on measures expressed as averages or means. For measures expressed as percentages, proportions, rates, or ratios, Condition I employs a standard z-test. The difference is that the standard z-test uses both incumbent LEC and competitive LEC variance in the denominator. The z-test uses only the incumbent LEC variance. AT&T and other competitive LECs have advocated use of the modified z-test, because including the competitive LEC variance in the equation allows the incumbent LEC to make the performance criterion more lax by increasing the variability of the performance it provides to the competitive LEC. SWBT has accepted the modified z-test for averages, but opposed it for the other types of measures due to that fact that, where percentage performance approaches 0 or 100 percent, the modified z-test produces problematic results (*e.g.*,
(continued . . .)

3. Condition I Relies on Arbitrary Benchmarks where Parity Should Apply

Condition I also improperly uses fixed benchmarks, rather than a parity comparison to the performance Applicants provide to their own retail operations, as the performance criterion for 11 of its 20 measures.[24] Performance data showing compliance with these benchmarks will not demonstrate compliance with Applicants' Section 251 obligations (or checklist compliance under Section 271), because parity comparisons to analogous activities by Applicants should be available and because the benchmarks themselves were established without empirical support.

The Commission long has made clear that direct comparison of actual performance to the same or reasonably analogous functions should be utilized for nondiscrimination determinations to the extent possible. *Ameritech Michigan Order* ¶139. This is so even if it requires departure from the incumbent's traditional internal performance reporting practices. *Id.* ¶ 210.

Returning a firm order confirmation ("FOC") or mechanized completion notice, responding to pre-order queries, and maintaining operational support system availability all have analogies in Applicants retail operations. This Commission has recognized as much. *See, e.g., Second BellSouth Louisiana Order* ¶¶ 100, 118, 120, 123, 128. By relying instead on a fixed benchmark to measure the timeliness of a FOC return, Condition I flies in the face of three Commission rulings:

> We stated in the *BellSouth South Carolina Order* that "the retail analogue of a FOC notice occurs when an order placed by the BOC's retail operations is recognized as valid

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zero in the denominator). However, there are simple methods for addressing these "tails," without discarding the modified z-test generally.

[24] Proposed Conditions, Attachment A-5. Two of the measures, Nos. 2 and 4, use benchmarks as the test for one submeasure, and parity for the rest.

> by its internal OSS." . . . As we have done in two previous orders, we reject the argument that a BOC does not have a corresponding FOC notice for its retail operations. We reiterate that, one way for a BOC to demonstrate that it meets the nondiscriminatory standard is to provide data on the timing of its provision of FOC notices to competing carriers and data on the time it takes its retail operation to receive the equivalent of a FOC notice. Because BellSouth has failed to provide data comparing its delivery of FOC notices to competing carriers with how long it takes BellSouth's retail operations to receive the equivalent of a FOC notice for its own orders, BellSouth has not provided sufficient evidence to demonstrate that it is providing nondiscriminatory access.

Id. ¶ 123.

All of these proposed benchmarks are deficient because they are not parity comparisons. For example, in the area of UNE provisioning, Applicants provide for the use of a parity comparison for percent SWBT-caused missed due dates, comparing, for example, 8 dB loop provisioning to its own retail POTS provisioning. Proposed Conditions, Attachment A-2, Measurement 2c. Condition I also calls for use of a parity comparison for DSL-capable loop provisioning. *Id.*, Measurement 6. There is no basis now, if there ever was one, for failing to define a parity comparison for such other measures of basic loop provisioning included in Condition I, such as Installations Completed Within X Days. Similarly, there is no basis for Condition I's failure to include a parity comparison for the important additional measure of average network element installation interval. *See id.*, Measurement 4c.

Furthermore, even for those measures where this Commission might consider a benchmark appropriate, the benchmarks in Condition I cannot be employed. These benchmarks were adopted by the Texas Commission as a matter of administrative convenience, with no showing from SWBT in arbitration or Section 271 proceedings that compliance with the benchmarks will provide an efficient competitor with a meaningful opportunity to compete. The standard loop provisioning interval of 3 days, for example, was established by arbitration in 1997, with Staff selecting between SWBT's proposed 5-day interval and competitive LEC's

proposed 2-day interval, with no evidence concerning the actual impact of any of these benchmarks on competition. In fact, the 3-day interval effectively proscribes the use of unbundled loops for any POTS-type residential or business service, where the competitive LEC's 3-day plus interval to establish service must compete with SWBT's same day/next day (if after 3 p.m.) interval. Similarly, the remainder of these benchmarks were adopted by the Texas Commission in the collaborative process, with no evidentiary hearing, after requiring competitive LECs either to suggest a benchmark or leave the Commission to consider SWBT's proposal on its own, then extrapolating between the two. The Texas benchmarks are at most temporary, subject to a reconsideration at 6-month intervals as data is collected, but no such periodic review is provided under Condition I.

Condition I also provides for an entirely inappropriate statistical test for the measures where benchmarks will apply. The benchmark itself should be defined in a way that allows Applicants reasonable latitude for the random variation in performance that will inevitably occur. That done, performance will violate a benchmark measure whenever the reported performance misses the benchmark. If the FOC return benchmark for basic electronic orders is 95 percent within 5 hours, then reported performance of 95.1 percent will satisfy the standard. 94.9 percent will not.

Condition I, however, provides for applying the z-test to these benchmark measures. The effect, at a minimum, is to lower the benchmark by the critical z-value (approximately 1.7 under Condition I). Now FOC return performance will not fail until it falls below 93.3 percent (the benchmark, less the critical z-value). In fact, the dilution is even greater, for the proposed Federal Plan compounds the error in the Texas plan on this point. Recognizing that application

of the z-test to benchmark measures was dubious, the Texas plan at least required use of a denominator of one, which limits the consequences of using the z-test to diluting the benchmark by the critical z-value. Under Condition I, the full standard z-test is called for, which means that the variance of performance provided the competitive LEC is included in the denominator. Under this approach, the greater the variance in performance provided to the competitive LEC, the lower the reported z-score, and the better chance of "passing" the benchmark test. Applying the standard z-test to benchmark measures in this fashion is statistically indefensible.

For all these reasons, Condition I does not provide an independent basis for adequate self-enforcement or for demonstrating compliance with the market-opening provisions of the Act. It will not advance the public interest in this context and should be rejected as a merger condition.

C. Condition I is Incomplete

The proposed Plan is also incomplete and inadequate in other important details.

1. The Definitions Are Inadequate

The definitions of the performance measurements to be included in Condition I are inadequate, and particularly inadequate for use outside of SBC affiliate SWBT's traditional five-state territory. Illustrative of the problems with these definitions, taken largely from working definitions in Texas, are the following (this list is by no means comprehensive):

- Measure 16 – Order Process Percent Flow Through: The definition and business rules for this measurement remain in unresolved controversy before the Texas Commission and, more recently, in Missouri. This critical operations support systems ("OSS") measure includes only "MOG Eligible" orders, according to the business rules. That term refers to SWBT's self-defined classification of orders

which will and will not flow through its systems, and it opens the door to a subjective exclusion controlled by Applicants. Problems with this measure are noted in the footnote hereto.[25]

- Measures 6 and 7 – DSL: Neither of these measures has been adopted in Texas. Performance measures related to ordering and provisioning for DSL-capable loops, along with a host of other DSL-related issues, are the subject of a pending

[25] These problems include: (1) The definition as stated is limited to LSRs when it should include both LSRs and supplements (Supps) of LSRs (*see, e.g.* Texas PUC SWB OSS Evaluation Master Test Plan, sec. 3.3.3.2 (4/22/99). Mr. Dysart indicated at the 5/10/99 Texas performance measure meeting that he would verify his belief that supplements are treated as orders for this purpose. The definition and business rule contained in Condition I should be clarified to make the inclusion of supplements explicit. (2) The measure should not be limited to MOG-eligible orders. If SWBT removes from the count any order that is not MOG-eligible, competitive LECs will not know whether it is an order type/activity/ feature combination that competitive LECs knew would not MOG, or one that SWBT has not yet disclosed. Further, the "MOG-eligible" classification arguably would allow SWBT to exclude all supplemental LSRs (if, in fact, SWBT has no ability to handle supplemental LSRs electronically), an approach that would result in a serious under-representation of the actual extent of manual processing. The business rule should recognize categories of orders, e.g., UNE-P, that are considered to be MOG-eligible and should include all such orders in the flow-through denominator. Exclusions all should be explicit and limited to order types that have been identified to competitive LECs as non-MOG-eligible. SWBT currently is considering whether to revise the business rule for this measure to commit that, in addition to MOG-eligible orders, all orders that flow through SWBT's EASE system for its retail service must flow through for competitive LECs. However, this commitment would not avoid the need for explicit identification of the order types that are not MOG-eligible and will be excluded from this measure. (3) Only electronically generated and returned rejects should be excluded (otherwise, SWBT has no incentive to move edits forward into LASR). At the 5/10/99 meeting, SWBT agreed to consider including in the pass-through calculation (as a failed pass-through occurrence) manually returned rejects of electronic orders. 5/10/99 Tr. at 369-71. Those rejects should be included here, or recorded in the reject measures. Otherwise, the picture of SWBT's electronic and manual processing of electronic orders that will be developed by these measures contains a serious gap, particularly in light of the volume of manual rejects being experienced in the testing. AT&T understands that SWBT more recently has agreed to change the Texas business rule to limit the exclusion to electronically generated and returned rejects, but this change has not yet been documented, to AT&T's knowledge. (4) At the 5/10/99 meeting, SWBT stated that orders that fall out after LASR, which are worked by SWBT and not rejected back to the competitive LEC, will be counted against SWBT in the flow-through calculation. *See* 5/10/99 Tr. at 366. This practice should be documented in the business rule. (5) SWBT activity used as the basis for parity comparisons should be specified.

arbitration. SWBT has made a paper commitment to follow the outcome of that arbitration in providing access to DSL-capable loops in Texas, as part of that State's 271 proceedings, but the terms that will come out of that arbitration remain very much in controversy. Applicants' proposed measurements thus reflect only the incumbent's positions on matters of controversy.

- Measure 2a – POTS Percent SWBT Caused Missed Due Dates: The parity comparison and levels of disaggregation do not match. The parity benchmark appears to (and should) require comparison of N orders versus N orders, T versus T, and C versus C. Most conversions to POTS-type service (resale or UNE combination) will be accomplished by C orders, which require no field work and which SWBT processes for itself on a same day/next day after 3 p.m. basis. Yet the disaggregation required by the business rule for this measure does not call for reporting separately the N, T, and C orders.

- Measure 2c – Percent SWBT Caused Missed Due Dates - UNE: This is an example of a measure that defines disaggregation levels with reference to a Texas interconnection agreement, a reference that may not sensibly or adequately transfer to interconnection agreements in other states. For a 13-state performance plan, these definitions and business rules must be reviewed to be complete and self-explanatory outside of Texas and the SWBT region, and either stripped of SWBT/Texas-specific jargon and acronyms or supplemented with adequate explanations of those terms.

A current deficiency cutting across all of these measures is the lack of any documentation of how Applicants actually will collect the data to be analyzed and reported. The addition of such a data collection process description for each measure is a requirement pending in Texas, which SWBT has yet to complete. None of the proposed measurements will be adequately defined and documented for use in any plan until a data collection process description has been added.

2. Condition I Lacks Provision for Independent Validation

Another missing component from Condition I is the requirement for an independent audit of Applicants' systems, documentation and practices for collecting, analyzing, and reporting this performance data, in order to validate that the data produced by Applicants is accurate and reliable. Condition I places essential reliance on Applicants' self-monitoring and self-enforcement. No such reliance could be justified without independent review and validation that Applicants are accurately making and reporting the required measurements. In order to be able to trust the data during the critical first year, this validation audit must take place before Condition I is implemented.

This independent review requirement is a matter of common sense before entrusting a historic monopolist with substantial responsibility to police its own conduct toward new competitors in the market it long has dominated, especially when that responsibility includes assessment of monetary sanctions against itself. In the case of Applicants, prior experience with self-reported performance data raises serious reliability questions and confirms the need to validate the data before relying on it and before extending Applicants any benefits on the basis of it.

Condition I proposed here is based on measurements developed by SBC's affiliate, SWBT. SWBT has been reporting data on some of these measurements for more than a year. Experience has shown that data not to be reliable. SWBT has retroactively restated data, months after it initially was reported, purporting to eliminate parity violations. SWBT has acknowledged that its reported data do not match its documented business rules for implementing these measurements in certain respects. Other errors in SWBT's reporting have

been evident. Recent Section 271 hearings in Missouri illustrated all of these problems, and even more recent Texas experience shows they have persisted.

For example, SWBT consistently has reported longer provisioning intervals for competitive LECs than for itself on resale POTS orders that do not require field work. In Missouri hearings in March 1999, SWBT sought to explain this disparity as a matter of competitive LECs requesting different due dates. SWBT offered restated performance data for July through September 1998, purporting to have subtracted out the orders for which competitive LECs requested due dates other than "next available." The result of this *subtraction*, however, was an *increase* in reported competitive LEC orders. Asked to explain this result, SWBT's director of performance measurements candidly answered: "I'm a mathematician. I'm going to have trouble doing that."[26]

This flawed retroactive restatement of performance data was but one of a series of errors and deficiencies in SWBT performance data reporting during the Missouri hearing. Others included SWBT's acknowledged inability to report comparative data on its own retail provisioning of special services;[27] mismatches between the number of competitive LEC orders reported for the same items on parallel provisioning measures, attributed by SWBT to inconsistency from one measure to another between reporting on a "per order" and a "per

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[26] Mo. PSC Case No. TO-99-227 (hereafter "Missouri 271 Proceedings"), Tr. 2101 (March 10, 1999) (Dysart cross); the original reported data showing parity violations is included in Ex. 2 (Dysart Direct) at Schedule 2-33; evidence of this same disparity in other states was included in Ex. 88 (Minter Reb.) at Attachment SM-3; the retroactively restated data appears in Ex. 119 at Schedule 2-46; and the matter is discussed at Tr. 2098-2101.

[27] Missouri 271 Proceedings, Tr. 2114-15 (Dysart cross). This information is necessary for the parity comparison to SWBT resale special services provisioning, one of the measures included in Condition I. *See* Attachment A-2, Measurement No. 4b.

item/circuit" basis;[28] discrepancies between the volume of Missouri loop provisioning reported by SWBT for Track A purposes and the volume shown in SWBT performance data;[29] and attributing abysmal loop provisioning data (achieving a Missouri required 3-day interval in only 13.5 percent of orders over the past year) to SWBT's professed inability to exclude customer requested due dates beyond the standard interval, even though the business rules for this measurement require such exclusion.[30] To this were added numerous reporting and formatting errors.[31]

These problems presented a compelling picture of the need for independent review. Missouri Commissioner Crumpton closed the hearing by addressing this statement about performance measurements to SWBT and Mr. Dysart:

> we may even want to believe that the thing is working properly, but *we can't verify that that data is the proper data going into the system*, and that was what I think was pointed out today during cross-examination, and you've even pointed out, some places where the data was incorrect. They were counting number of orders as opposed to number of circuits.

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[28] Missouri 271 Proceedings, Tr. 2116-17, 2121-22 (March 10, 1999) (Dysart cross). This problem affected at least the measures of average installation interval and missed due date measures for resale special services provisioning and for UNEs, which are Measurement Nos. 2b, 2c, 4b and 4c under Condition I.

[29] Missouri 271 Proceedings, Tr. 2082-83 (Dysart cross). This problem affected the measurement for UNE average installation intervals, Measurement No. 4c under Condition I.

[30] Missouri 271 Proceedings, Tr. 2118-20 (Dysart cross). This problem affected the measurement for percent missed due dates for UNEs, Measurement No. 2c under Condition I.

[31] Missouri 271 Proceedings, Tr. 2109, 2111, 2165 (pre-order response time reporting discrepancies and Excel formatting error); 2113 (percent FOCs returned within X, Excel error); 2164 (missed due dates due to lack of facilities, UNE combinations – discrepancy between data and graphic report for measure); 2124-25 (missed due dates for interconnection trunks – discrepancy in two versions of reported data covering the same period); Tr. 2165 (premature disconnects – discrepancy between data and graphic report).

So once we assume that the system is working, *then we want to verify that the data that is being crunched in the system is accurate.*[32]

More recent experience in Texas underscores Commissioner Crumpton's concern to verify that accuracy of the data being collected and reported by SWBT. There SWBT reported parity violations in its March 1999 report of January – February 1999 performance on two POTS maintenance measures across four Texas regions. Based on the March report, SWBT owed $350,000 liquidated damages to AT&T under the current contractual formula in Texas. In April, however, SWBT re-reported the January and February 1999 data, retroactively changing the way it classified "dispatch in" trouble tickets (requiring central office work). By reportedly moving these tickets from the "no dispatch" category to the "dispatch" category, SWBT's restated data for these measures converted a $350,000 liability into a $175,000 credit against future violations.[33]

Whatever explanation Applicants might offer for any of these mistakes or changes in performance data, they leave no doubt that SWBT's performance measurement systems and practices, and the data SWBT is reporting, must be validated and verified independently before important reliance can be placed on them. That validation has not occurred. Telcordia reportedly is undertaking some sort of review of SWBT performance measurements in Texas at present, but the scope of that review and the nature of Telcordia's activity is unknown and has

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[32] Missouri 271 Proceedings, Tr. 2203-04 (March 10, 1999) (emphasis added).

[33] These facts are detailed and documented in AT&T's Letter to ALJ Regarding Retroactive Changes To Performance Data and Other Validation Concerns, PUCT Project No. 16251 (May 11, 1999) (hereafter "AT&T Texas Validation Concerns Letter"). The credit provisions of the current contractual liquidated damages terms were imposed by arbitration, have been reconsidered by the Texas Commission, and are not included in its current performance remedy plan.